

Pierce County

Office of the Prosecuting Attorney

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May 3, 2011

Clerk of the Supreme Court
Attn: Camilla Faulk
P.O. Box 40929
Olympia, WA 98504-0929

By Email To: Camilla.Faulk@courts.wa.gov

Re: Comments on proposed CrR 4.11 – Recording Witness Interviews

Dear Ms. Faulk:

Attached please find comments I am submitting in support of proposed rule CrR 4.11 –
Recording Witness Interviews

Very truly yours,

Stephen Trinen
Deputy Prosecuting Attorney

Comments on Proposed CrR 4.11
By Stephen Trinen, WSBA# 30925
Deputy Prosecuting Attorney, Pierce County

Disclaimer. While these comments are made in the course of my employment as a Deputy Prosecuting Attorney and my superiors were aware that I would be submitting them, these comments have not been reviewed or approved by my superiors and do not represent an official position of office of the Pierce County Prosecuting Attorney. Rather, they are solely my own personal opinions as a professional practitioner who has dealt with legal issues arising from disputes over witness interviews in the course of my job duties.

COMMENTS

The court should not adopt the proposed rule CrR 4.11 where the rule is a complete break with historical standards and would effect a major and unprecedented change to the status of witnesses in interviews

Instead the court should adopt a more limited rule permitting the use of recordings made only with the consent of the witness.

Witness' interests support not compelling recorded interviews.

Recorded interviews can become public records at the conclusion of trial. *See, e.g. Seattle Times v. Serko*, 170 Wn.2d 581, 597ff (2010). Upon conclusion of the investigation, police records are subject to public disclosure. *See, e.g. Serko*, 170 Wn.2d at 592-94. Recordings of interviews are not themselves attorney work product and thus can also be subject to disclosure as a public record. *See, e.g. Serko*, 170 Wn.2d at 591.

Release of recordings can cause great harm or embarrassment to witnesses or third parties. In developing information and determining what is relevant is often necessary in interviews to delve into extremely sensitive issues that are ultimately collateral to the evidence in the case or otherwise inadmissible. Such matters can include sensitive medical information including medical conditions and mental health issues, paternity of children, prior history of victimization by others, prior criminal history, and in the case of sex offenses everything from unique characteristics of sexual anatomy, to fetishes, prostitution and other sexual conduct.

In the internet era, once released, electronic recordings can exist forever on the internet, so that witnesses or others can never escape them or the harm from their having once been made public.

Crime victims would be re-victimized by defendants obtaining copies of the recordings and replaying them for pleasure or amusement.

Undercover officers and informants don't want recordings that could be used identify them or generate their voice prints, etc. to be posted on web sites used by defendants to expose informants, e.g. www.whosarat.com Such exposures could be life threatening.

The recorded interview process could be abused to improperly develop information that is subsequently exploited in a civil lawsuit. Where the interview may take place before a civil suit is filed and the witness is not advised by counsel.

Recorded interviews can be a mechanism for punishing all manner of witnesses for participating in the case. In a recent case defense attempts to compel recording of witness interviews caused the witness to refused to further participate in the case or testify, resulting in a significant reduction in charges well beyond what otherwise would have been offered.

Neither the State nor defense represent the witnesses and cannot advise them. Therefore it is of great importance that witnesses should retain the right to decide for themselves what their interests are and whether or not they wish to expose those interests in a recorded interview.

The court should not sacrifice witness' rights for attorney convenience

Stunningly, the defense bar refuses to recognize witness' civil rights as soon as it becomes inconvenient for the attorneys. Witnesses often possess a constitutional right to remain silent. Witnesses in criminal cases are often close to the crime or ancillary criminal activity and retain a right against self-incrimination. It is not uncommon for witnesses initially trying to minimize or falsify their own or the witness' involvement to make partially or completely false statements to officers. Even professional witnesses such as officers may occasionally choose to exercise their right to remain silent, e.g. if there were accusations of excessive use of force, misrepresentation, civil rights or criminal statutory violations, etc. and an investigation were still pending.

Compelled interviews can cause witnesses to incriminate themselves. Witnesses in interviews are rarely received independent counsel to advise them during the interview. The cost of routinely providing such counsel would be extremely high. The lack of independent counsel could also sabotage collateral criminal investigations arising out of a case. Those concerns do not exist when the witness voluntarily participates in an interview.

Electronic recordings are a convenience for attorneys. They can be useful and should be allowed, but only when voluntarily agreed to.

History of the Rule on criminal depositions

"[T]he scope of discovery allowable through depositions in criminal cases historically has been more limited than in civil cases." *State v. Gonzalez*, 110 Wn.2d 738 (1988); *see also State v. Mankin*, 158 Wn. App. 111 (2010). The Washington rules derive from the federal rules, the source for the different treatment of civil and criminal depositions.

Several reasons support different treatment of criminal and civil depositions by the federal rules FRCP 15 and FRCP 30. The differences are rooted in variances in pre-rule civil and criminal procedures. Compare 2 Wright & Henning *Federal Practice and Procedure: Federal Rules of Criminal Procedure*, vol. 2 § 241-246 (2009) with 8A Wright, Miller & Marcus, *Federal Practice and Procedure: Federal Rules of Civil Procedure*, vol. 8A § 2101-2104ff (2010).

Prior to 1970 there was concern that it could be unconstitutional for the State to obtain orders for depositions in criminal cases. Constitutional rights of witnesses are more present in criminal cases. There was also a fear of that criminal cases could devolve into trials by deposition. In criminal cases the witnesses belonged to neither side. Thus, depositions in criminal cases were only allowed in exceptional circumstances. However, in civil cases many witnesses do belong to one side or the other (parties, retained experts, etc.). Corporations are often civil parties so that counsel and their investigators cannot directly contact many of the witnesses without risking improper contact with an opposing represented party. The articles listed above detail additional differences.

The real effect of the proposed rule is to serve as a crutch to incompetent attorneys.

Prosecutors have not supported compelled recording of interviews because they know first hand it is not necessary. Prosecutors routinely conduct highly effective cross examination of witnesses without any benefit of a pre-trial interview at all, much less a recording, whenever a defendant testifies.

The defense claim that the lack of a recording renders counsel ineffective is patent nonsense. Prior to the invention of electronic recording defense and prosecution attorneys were not universally ineffective. The subsequent invention of inexpensive recording devices has not somehow magically rendered all defense and prosecution attorneys ineffective when they don't use the devices.

The comments on the cover sheet to the proposed rule are self-serving and badly misrepresent facts and law.

Where the interviews are not open to the public, they are a "private conversation" under the Privacy Act, notwithstanding the analysis in *State v. Mankin*, 158 Wn. App. 111 (2010) (concluding otherwise as to only officers, but failing to conduct a plain language analysis of the statute). "Private" means "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1804-05 (2002). "Conversation" means "oral exchange of sentiments, observations, opinions, ideas: colloquial discourse." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 498 (2002). In interpreting RCW 9.73.030, at least one court has held that "private conversation" is an all-embracing term, broad enough to include a conversation between a defendant and his attorney or a police officer. *State v. Grant*, 9 Wn. App. 260, 511 P.2d 1013, review denied, 83 Wn.2d 1003 (1973), cert. denied, 419 U.S. 849, 95 S. Ct. 87, 42 L. Ed. 2d 78 (1974)

Victim groups are strongly opposed to compelled recordings, being particularly concerned about misuse.

Defendants do not have a constitutional right to have a successful interview of witnesses prior to trial. See 22A CJS § 634-636. Indeed, some states victim rights laws prohibit even a pre-trial interview with the victim unless the victim consents and have been held constitutional. See *State ex rel. Romley v. Superior Court in and for Maricopa County*, 836 P.2d 445, 172 Ariz. 232 (1992). A thorough discussion of victim rights laws is provided by 95 A.L.R.5th 343 *Validity, Construction and Application of State Constitutional or Statutory Victims's Bill of Rights* (2001) .

None of the concerns of victims groups, law enforcement or prosecutors are resolved by the rule as proposed.

Beware The Law of Unintended Consequences

Recording devices can fail to capture everything heard by the parties or fail unbeknownst to the parties. This does not occur with court reporters who advise the parties when they can't hear or understand something. Recordings can be damaged or lost, leaving no or incomplete records of the interview.

In a recent case witnesses voluntarily agreed to the terms of the proposed new rule. After conducting the interview defense counsel subsequently balked at timely providing promised copies of the recording to the witnesses, fearing that the recording could be shared with other witnesses, or used for trial preparation.

With recordings, some trial counsel become overly fixated on minute differences in testimony in attempts to impeach the witness, bogging trial down. This problem can be compounded by the need to redact and/or cue the recording to the relevant portions, including moving the jury in and out of the courtroom to do so.